

BEFORE THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA
REGION 19

TRANSERV SYSTEMS, INC.

Employer

and

Case 36-RC-6112

INDUSTRIAL WORKERS OF THE
WORLD INDUSTRIAL UNION 540,
MUNICIPAL TRANSPORT WORKERS

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record¹ in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All driver and bicycle messengers (including process servers) employed by the Employer; but excluding all other employees, casual employees, guards and supervisors as defined in the Act.

The Employer is engaged in the business of delivery services, with headquarters in Portland, Oregon. The Employer also has employees located in 12 additional cities: Salem, Albany, Eugene, Newport, Roseburg, Coos Bay, Tillamook, Pendleton, Redmond, McMinnville,

¹ Briefs were timely received from the parties and duly considered.

St. Helens and Medford, Oregon (herein collectively called the "Outlying Areas"), but has no physical facilities in those locations². The Petitioner seeks a unit of all of the Employer's driver and bicycle messengers in Portland, Oregon only. The Employer contends the unit should include all driver and bicycle messengers employed in Portland and all drivers located in the Outlying Areas. No history of collective bargaining is demonstrated in the record.

The parties stipulated that all regularly scheduled driver messengers³ and bicycle messengers employed by the Employer for delivery service at its Portland, Oregon, facility should be included in any unit found appropriate by the Regional Director as they share a sufficient community of interest in regards to wages, hours and working conditions.⁴ The parties stipulated that the supervisor of legal processing and the operations manager are statutory supervisors within the meaning of the Act. Further, the parties stipulated that the classifications of office clerical employees, including dispatchers, bookkeepers, customer service representatives and general clerical employees, do not share a sufficient community of interest in regards to wages, hours, and working conditions and should therefore be excluded from any unit found appropriate by the Regional Director.

FACTS

The Employer provides document - both legal and general - and package delivery services in and around the named cities for both private customers and the State of Oregon. It also serves legal process at all locations. Bicycle messengers perform only general deliveries. Drivers may perform only general deliveries, only process services, or a mixture of both. The amount and type of deliveries differ from city to city, depending on the market.

At the time of the hearing, 14 Portland bicycle messengers and 23 Portland drivers worked directly out of the Portland facility. All of the Employer's bicycle messengers are located in Portland and work only in the downtown Portland area. In approximately the last two quarters of 2001, there were roughly up to 18 Portland drivers whose primary duties did not include process serving and up to 14 Portland drivers whose primary duties were process serving. There are two drivers in Salem, two drivers in Eugene, and one driver in Medford who make both legal and non-legal deliveries, although their primary work is process servicing.

Until fairly recently, the Employer generally did not operate directly in the following 8 cities: Newport, Coos Bay, Tillamook, Roseburg, Pendleton, Redmond, McMinnville, and St. Helens (herein collectively called "The New Areas"). Previously, if the Employer were to handle deliveries in one of these areas, the transaction would have been accomplished through a local

² See Exhibit B.

³ This term is used to cover all these who deliver packaging and/or papers or serve legal process, by vehicle.

⁴ In 1993, the Portland Bicycle Messengers Union petitioned for a unit of bicycle messengers at the Employer's Portland facility, excluding drivers. The Employer contended the petitioned for unit was inappropriate and should also contain drivers. At the time the Employer's facility was in Portland, but, it also had drivers in Eugene and Salem. There were no bicycle messengers outside of Portland. On May 28, 1993, the Board issued a Decision on Review and Order holding that the petitioned for unit of bicycle messengers did not have a sufficiently distinct community of interest from drivers to warrant separate representation. The Board did not speak to the issue of an employer-wide unit. On remand, the then Regional Director issued a Supplemental Decision and Direction of Election on June 4, 2002, finding the appropriate unit to be all bicycle messengers and drivers working for the Employer in Portland, Salem, and Eugene. The decision did not discuss the appropriateness of an employer-wide unit. I take administrative notice that the Union thereafter withdrew its petition.

sub-contractor. However, the Employer recently entered into a statewide contract with the State of Oregon for deliveries ("State Contract"). The majority of the State of Oregon work is legal service. Due to insurance specifications in the State Contract, the Employer engages individuals directly to perform State Contract work in these "new" areas, rather than working through a subcontractor or an independent contractor. These individuals may also be direct employees of the Employer's subcontractors for other deliveries originating from the Employer's non-State customers, or whatever other work the subcontractors might generate themselves, but not necessarily; they might perform no such services for anyone else. Accordingly, the drivers in the New Areas may actually perform only a relatively limited amount of work - restricted to State of Oregon deliveries - as the Employer's employees⁵.

All the Employer's supervisors, managers and support personnel work in the Portland facility. The vice-president is Gatson Gutierrez, who interviews and trains employees as well as assisting in dispatching drivers for legal process in the Outlying Areas. Mitch (last name not stated on the record), the process server manager in Portland, also interviews and dispatches drivers for legal processing in these areas.⁶ The record states that all the drivers outside of Portland are supervised out of the Portland office, but such supervision is unnamed. It is unclear if the same supervisor(s) supervise(s) the Portland employees. The record also states that a supervisor - unnamed in the record - handles all discipline for all messengers system-wide.⁷ However, the record also states that the vice-president, the process server manager, and Steve Justin (title unidentified) have disciplined employees in Eugene. Suffice it to say, all discipline and all supervision of all employees is handled from the Portland office.

There is a dispatcher for the drivers and a separate dispatcher for the bicycle messengers. Both dispatchers work out of the Portland facility. The Portland messengers are dispatched by radios and the drivers outside of Portland are dispatched by telephone, pager or mail⁸. However, the driver dispatcher typically does not dispatch process-serving work for drivers in Outlying Areas, as those drivers do not carry radios. These dispatches are generally handled by either the process server manager, customer service, the vice-president, or other staff. The record does not indicate that the dispatchers handle any supervisory functions; the "exclusions" stipulation excludes them as clerical.

Bicycle messengers generally make deliveries during regular business hours (7:30 a.m. to 6:00 p.m.) and do not work on the weekends. The record regarding the specific work hours and schedules of the drivers is rather vague. Some of the drivers who do not serve process, work the same hours as the bicycle messengers, as their deliveries can be done during work hours. Some of these Portland drivers have specific delivery schedules during regular work hours, but are sometimes given extra work outside their schedules. A number of Portland drivers who serve process, work only when work is assigned and do not have a set schedule. At one point, the record states that outside of Portland, most drivers have a regular work schedule in that they have specific deliveries to make on specific days. At a later point in the

⁵ No party suggests that these individuals performing the State Contract deliveries, in the New Areas are anything but "pure" employees of the Employer. The Employers seeks out and hires these individuals directly, and dispatches them directly.

⁶ Gatson and Mitch interview and train drivers in cities outside of Portland, but the record is silent as to *who* interviews and trains drivers and bicycle messengers in Portland. It is clear that the function is performed from Portland, however.

⁷ "Messengers" refers to both driver and bicycle messengers.

⁸ Process that required legal service, but not immediate action, might be mailed to the outlying employee, to perform personal service.

record, the testimony is that drivers outside of Portland do not have a regular work schedule in that they do legal processing, so that they are assigned work when needed, normally outside of work hours. This seeming contradiction may be due to a failure to distinguish between drivers in the New Areas from drivers in the rest of the Outlying Areas. Suffice it to say that there is regular work that is identical to some of the work routinely performed in Portland, routinely performed outside of Portland.

In Portland, the bicycle messengers either pick up and complete a delivery or pick up deliveries at customers' offices and then transfer them to a driver for ultimate, more distant delivery. The Salem and McMinnville drivers have made some deliveries to Portland; however, there is no specific evidence as to how often these employees work in Portland or if they interact with Portland Unit employees when they do. Salem drivers also make deliveries to Eugene, and Portland drivers make deliveries "all the time" to some of the other cities, including, at least, Salem and Newport. However, the record gives no specific evidence as to how often these inter-city deliveries occur, which other cities are involved, how many drivers do these deliveries, or if drivers interact with each other in these circumstances. However, it does not appear that drivers outside of Portland have any significant contact with Portland messengers or with each other. There have not been any job transfers between drivers and bicycle messengers; or from drivers in Portland to the other cities, or vice versa.

Messengers are paid based on the type of delivery made. For ordinary deliveries the rate of pay is 30% of the gross revenue per piece. For legal process serving, employees get a fixed rate per piece, but the rate in Portland is different from the other cities, and outside of Portland, the rates vary from city to city. The set rate for Portland is not indicated in the record. Outside of Portland, the rate is either \$10, \$12, or \$15, depending on the volume of work, the distance traveled, and the deadline for delivery. The rates for each particular city are not reflected in the record. The rates outside of Portland were negotiated on a one-on-one basis with each employee, although all employees within any one city are paid the same rate.

In Portland, all employees must report their hours for each pay period. The bicycle messengers punch in on a time clock through the dispatchers. Those Portland drivers whose primary functions are not process serving also use the time clock through the dispatcher, with supplemental hours for any process serving turned in on a handwritten log. The Portland drivers who serve legal process keep a handwritten log and then turn in the log. However, not all employees outside of Portland are required to report their hours worked. It appears from the payroll records that approximately 11 of the 16 drivers do not turn in their hours. Because of some difficulties in payroll, these employees are paid according to the piece rate without a record of actual hours worked. Instead of turning in a timecard, these employees turn in documentation of deliveries made. If the employee notices the pay does not meet minimum wage⁹, they report it to the Employer who adjusts the pay. Those drivers outside of Portland who are required to report hours worked, turn in a handwritten log. In sum, all are paid on a piecework basis of some kind, but there are *some* time records kept to establish compliance with minimum wage laws.

The Employer makes standard deductions, including state and federal income taxes, FICA, and workers' compensation, from the paychecks of all drivers and bicycle messengers. Medical and dental plans are available for all employees, provided coverage could be found in each particular city. The record does not specify which cities are covered by health benefits. The employee handbook states employees are eligible for health benefits after six months if

⁹ I take administrative notice that the Oregon minimum wage is \$6.50 per hour.

they are regularly scheduled to work 30 hours or more per week. The record does not indicate which employees are currently eligible. Employees become eligible for vacation pay after they have been employed for one year and if they earn a minimum average of 20 hours per week over the previous 24 consecutive pay periods¹⁰. Only one employee outside of Portland is currently eligible for vacation pay. The record does not indicate how many people in Portland qualify. According to the handbook, all employees are eligible for holiday pay after one year of employment.

All drivers must provide their own car and are paid the same mileage rate. Drivers are allowed to use a company gas card and are charged back, but only three Portland drivers have opted to use the card. All bicycle messengers must wear a company uniform consisting of a red shirt and helmet cover. Portland drivers whose main work does not involve process serving must wear the red company shirt. Portland drivers who mainly serve process do not have to wear the company shirt, the shirt being an identifier, a negative in process-serving contexts. None of the drivers in the outlying cities has to wear a uniform, as most of them mainly serve process. Magnetic and window company signs are provided to Portland drivers so they can park in Portland without fear of receiving a parking ticket. Such signs are not provided to employees outside of Portland¹¹. Pagers are offered to all drivers and bicycle messengers; all employees in Portland carry the company pager. Some employees in the other cities have chosen to use their own pagers and are not reimbursed for such use; but all those in the Outlying Areas carry a pager.

There are regularly scheduled meetings for the bicycle messengers; however, the record does not indicate the regularity or purpose of the meetings. Drivers do not have such meetings. The same clerical employees handle payroll issues for all drivers and bicycle messengers. The Employer has company parties for its employees, to which *all* employees are invited. Customer service employees in the Portland facility and/or the vice-president take care of all customer complaints from all locations.

CONCLUSIONS

Unit

The Employer argues that all its drivers and bicycle messengers are subject to the same terms and conditions of employment and do identical tasks.¹² The Employer further relies on the 1993 Board decision and the Regional Director's June 4, 1993 decision. As noted, neither the Board decision nor the Regional Director's decision addressed the issue of an employer-wide unit.¹³ The Petitioner argues that it should only represent those messengers who work in the Portland office. The Petitioner presents a second issue, arguing that the drivers working in the Outlying Areas do not work a regular amount of hours and are therefore not eligible to vote.

¹⁰ There are two pay periods per month.

¹¹ The record does not reflect if they are simply not needed outside of Portland, or perhaps not honored by the authorities outside of Portland.

¹² The Employer's brief was not timely filed and is therefore not considered. The Petitioner did not file a brief.

¹³ It would seem likely, based on the absence of discussion, that the parties simply stipulated to the larger unit. The only issue discussed was whether bicycle messengers shared a community of interest with other employees. Further, any finding by a Regional Director is not binding, as Regional Director's decisions lack precedential value. *Rental Uniform Service*, 330 NLRB No. 44, fn. 10 (2000).

A single-facility unit is presumptively appropriate unless it has been effectively merged into a more comprehensive unit, or is so functionally integrated with another grouping of employees that it has lost its presumed separate identity. *J & L Plate*, 310 NLRB 429 (1993); *Cargill*, 336 NLRB No. 18 (2001). The party challenging the appropriateness of a single-facility unit has the burden of rebutting the presumption. In determining whether the presumption has been rebutted, the Board looks at such factors as control over daily operations and labor relations, including extent of local autonomy; similarity of skills, functions, and working conditions; degree of employee interchange; the physical and geographic location including distance; and bargaining history, if any. *Esco Corp.*, 298 NLRB 837, 839 (1990). The Board has historically emphasized most heavily the extent of local autonomy, especially separate supervision, as well as the degree of employee interchange.

In analyzing the factors relied on by the Board, I note that the instant case presents a close question as to whether the presumption of a single-facility unit has been rebutted. There are factors present which support a finding of a single-facility unit. Most noteworthy is the limited amount of employee interchange. Although there are vague references to drivers making deliveries outside of the city they normally work in, the exchange of work appears limited, and to a limited number of cities. There is also a lack of temporary or permanent employee transfers between cities. Finally, I take administrative notice that the geographic separation between the cities ranges from 29 miles between Portland and St. Helens, to about 273 miles between Portland and Medford; some of these distances are rather large.

There are however, significant factors which undercut the single-facility presumption. In making such a finding, the Board relies heavily on "whether the control of day-to-day working conditions is separate and autonomous" at each location. *AVI Food Systems, Inc.*, 328 NLRB No. 59, 8 (1999). As there are *no* Employer facilities in the Outlying Areas, all employee functions are centrally controlled, from Portland. Significantly, direct supervision and day-to-day concerns of all the messengers are handled centrally in Portland. Hiring decisions, disciplinary actions, and training are determined by Portland supervisors. All customer orders – phone in most or all circumstances – come through the Portland office and are dispatched from there. All customer complaints are resolved there.

Further, the Employer maintains centralized control over labor relations and administrative operations. The personnel policies and employee handbook apply to all employees regardless of location. The wage range and hours of employment are determined by Portland management. All payroll cards, timesheets, and work documentation are turned into the Portland office. The employees are all paid a piece rate per delivery and are all eligible for medical/dental coverage, vacation pay, holiday pay, and a 401(k) plan. Further, all drivers receive the same mileage reimbursement rate. All employees perform some or all aspects of a common pool of similar work: deliveries and process serving. Employees in all locations serve process. Uniform requirements are the same company-wide. All drivers are eligible for gas cards and all messengers use pagers.

The distances between Portland and the various cities served does not support either a Portland unit or an overall unit. St. Helens, McMinnville and Salem are only 29, 38 and 47 miles from Portland, respectively. On the other hand, Pendleton and Medford are 208 and 273 miles from Portland respectively. In weighing all factors, I find that the centralized control over personnel and labor relations policies; common supervision of all employees total and lack of local autonomy or even local facilities; and the same duties, skills and terms and conditions of employment, outweigh the few factors which would support the single-facility presumption, including limited employee interchange, and geographic distance in some cases. In view of the

record as a whole, the fact that there is not substantial employee interchange diminishes in its importance to the determination of the issue. *Big Y Foods, Inc.*, 238 NLRB 860 (1978); *V.I.M. Jeans*, 271 NLRB 1408 (1984). Thus, on balance, the record evidence in the instant case forces the conclusion that the single facility presumption favoring a Portland-only unit has been rebutted, and I find the appropriate unit must include Portland and the Outlying Areas. I also note that exclusion of the Outlying Area drivers would leave a hodge-podge, fragmented residual unit, or multiple single-location units, many of which would have only one employer, making representation impossible, even if wanted by employees.

In most enterprises, there are full-time employees, and the balance of employees regularly work substantial hours. All such employees are normally deemed eligible to vote. In some situations, such as the instant one, some employees work substantial numbers of hours, while other work smaller amounts. The Board seeks "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and condition of employment offered by the employer." *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992). In seeking such a goal, the Board routinely devises eligibility formulas tailored to the factors of each case.

In the instant case, there is limited record evidence of *hours* worked by the messengers, since all compensation is by piece rate. However, the record contains *wages* earned by messengers from the pay period ending June 26, 2001 to the pay period ending December 11, 2001. As there is a close correspondence between wages and hours worked, the eligibility formula for this case will be based on pay periods worked and wages earned. In using wages as the basis for the formula, I note that typically, affinity with the unit would increase in relationship to the amount of money earned as well as to the amount of hours worked. More of either in a given time frame, likely leads to a higher level of interest in the terms and conditions of employment offered by the employer. It must be kept in mind that no formula is perfect, that there is no single, absolute answer to any particular situation, and that several different formulas might be reasonable. Nevertheless, some formula must be selected.

In creating a formula, I relied on gross wages earned from the pay period ending August 11, 2001, to the pay period ending December 11, 2001.¹⁴ The gross *wages* for each messenger employed during that time were summed, so that each employee had a grand total of gross wages for the time period. The grand total of each messenger is graphed on a chart which is attached as Exhibit A. As shown on the chart, there is no obvious break point in the amount of gross wages earned; rather - somewhat unusual in my experience - there is a full range of earnings in a nearly linear relationship from high to low. Nevertheless, some point must be selected.

I devised a formula to establish a break point in gross wages which will determine eligibility. In establishing the formula, I extrapolated the earnings from the August 11, 2001 through December 11, 2001 pay periods, to what they would likely be in a span of two full quarters - 26 weeks, or 12 pay periods. The Board often sets voting eligibility at an average of 4 or more hours of work per week over a particular period. See, e.g., *Queen Kapiolani Hotel*, 316 NLRB 655, 667 (1995). Thus, I multiplied the 26 weeks in the two-quarter period by 4 hours of work per week, to establish a minimum 108 hours worked during the sample time span as a reasonable eligibility minimum, if the formula were based on *hours* worked. To convert these

¹⁴ The pay periods ending June 26, July 11, and July 26, 2001, were not used, as it appears many drivers were not yet employed during that time period, presumably because of the recency of the State Contract.

108 hours into a dollar amount¹⁵, I multiplied the 108 hours by \$7.00 per hour to arrive at a total of \$756.00.¹⁶ I then rounded the total of \$756.00 to \$750.00. Therefore, all employees who had gross earnings of at least \$750 total in the time period of the 12 consecutive completed pay periods ending immediately prior to the date of this Decision, and who are still employed in the Unit as of the election date, will be eligible to vote.

There are approximately 53 employees in the Unit¹⁷.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are *only* those who earned at least \$750 total in the 12 consecutive completed pay periods ending immediately prior to the date of this Decision, regardless of when hired. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by INDUSTRIAL WORKERS OF THE WORLD INDUSTRIAL UNION 540, MUNICIPAL TRANSPORT WORKERS.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an eligibility list containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer in Charge of Sub-Region 36, within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The lists must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the lists available to all parties to the election.

In order to be timely filed, such list must be received in the Sub-regional Office, 601 SW 2nd Ave., Suite 1910, Portland, OR 97204-3170, on or before February 7th, 2002. No extension of time to file the lists may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such lists. Failure to comply with this

¹⁵ Since complete Employer records are available on the record only in terms of earnings, not hours worked.

¹⁶ The minimum wage in Oregon is \$6.50 per hour. I increased the rate in the formula to \$7.00 per hour as it appears from the payroll records that most employees are paid more than minimum wage.

¹⁷ In view of the fact that the Unit has been substantially increased over the Unit petitioned for, the Petitioner will have 10 days to furnish an additional Showing of Interest, or to withdraw its petition without prejudice. The Petitioners has a sufficient Showing of Interest to support the larger Unit.

requirement shall be grounds for setting aside the election whenever proper objections are filed. The lists may be submitted by facsimile transmission to (503) 326-5387. Since the lists are to be made available to all parties to the election, please furnish a total of 4 copies, unless the lists are submitted by facsimile, in which case only one copy need be submitted.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by February 14th, 2002.¹⁸

DATED at Seattle, Washington, this 31st day of January 2002.

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National Labor Relations Board, Region 19
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¹⁸ Because of delays caused by biological decontamination of governmental mail in D.C., it is strongly suggested that commercial delivery services be utilized.